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SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1968

No. [redacted] 3

RICHARD ALLEN, ET AL.,
Appellant,

v.

STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

RESPONSE OF APPELLEES TO THE MEMORANDUM FOR THE UNITED STATES

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RESPONSE OF APPELLEES TO THE MEMORANDUM FOR THE UNITED STATES

On February 14, 1968, the Solicitor General filed a memorandum expressing the views of the United States in the case at bar. The following day counsel for the parties were informed by letter of the Clerk of this Court that they would be permitted to file supplemental briefs on or before March 5, 1968. In accordance with the leave thus granted, this response of the appellees to the memorandum of the United States is filed.

As previously pointed out by appellees in their motion to affirm the judgment of the District Court, the Virginia State Board of Elections issued certain instructions to

election officials throughout the State on August 12, 1965 and October 15, 1965. The first instructions were promulgated within a week of the effective date (August 6, 1965) of the Voting Rights Act of 1965, and the second instructions were issued some three weeks before the first general election held in Virginia after the effective date of the Voting Rights Act. In effect, these instructions advised Virginia election officials (1) that the Voting Rights Act of 1965 *had become* effective in Virginia on August 6, 1965, and was "*now* in force in Virginia" and (2) that under the provisions of the Federal law, they were required to render assistance to educationally handicapped citizens who were unable to register or to vote because of a lack of literacy or otherwise. Emphasis supplied. See, Statement of Appellees Opposing Jurisdiction and Motion to Affirm, pp. 4-5. Essentially, the instructions in question advised such election officials that various provisions of Virginia law governing registration and voting had *already* been suspended by the Voting Rights Act and that they were *immediately* required to render assistance to prospective voters who were educationally handicapped.

The Solicitor General asserts that instructions of this character, particularly those issued on October 15, 1965, constitute a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and states that it "would appear to follow that the new requirement could not be used without first passing the scrutiny of either the Attorney General or the United States District Court for the District of Columbia." See, Memorandum for the United States, pp. 6-7. The latter statement is referable to that portion of Section 5 of the Voting Rights Act which suspends the efficacy of any State voting regulation promulgated after November 1,

1964, unless there has been (1) submission of the rule to the Attorney General, in which case it may be used if no objection is interposed within sixty days; or (2) a declaratory judgment from the United States District Court for the District of Columbia that the rule "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . ." See, Memorandum for the United States, p. 6.

Counsel for appellees submit that the invalidity of the Solicitor General's position is easily demonstrable. If the instructions issued in the case at bar were subject to the provisions of Section 5 of the Voting Rights Act, it necessarily follows that a State to which the Act applies could not adjust its procedures to comply with the requirements of the Federal law until they received permission to do so from the Attorney General or the District Court for the District of Columbia. The Solicitor General's assertion overlooks the fact that the instructions under consideration were not promulgated to alter Virginia law as such, but were required to implement the Voting Rights Act which became effective on August 6, 1965. The Solicitor General's contention impels the conclusion that the Voting Rights Act, which became law on August 6, 1965, could not be made effective in practice without the prior consent of the Attorney General or the District Court. Such a conclusion is tantamount to the proposition that the Voting Rights Act could be suspended until the Attorney General or the District Court approved of a State's instructions complying with the Act. Counsel for appellees submit that there is nothing in the Federal statute which even remotely evidences an intention on the part of the Congress to delay the effectiveness of the Voting Rights Act until such permission is first obtained.

No one can say how many illiterate voters were registered pursuant to the instructions of the State Board of Elections within the first sixty days of the enactment of the Voting Rights Act—persons who could not properly have been registered during this period if the position of the Solicitor General is sound. Similarly, there is no way to ascertain how many illiterate voters were assisted in casting their ballots at the general election in November of 1965, pursuant to the instructions in question—voters who could not have been thus assisted had it been necessary to await the expiration of a sixty-day period following issuance of the instruction on October 15, 1965.

Moreover, the Solicitor General suggests that the Court remand this case to the District Court with instructions "to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance" with the requirements of Section 5. This suggestion is obviously an attempt to convert the instant case into litigation of the character instituted by the United States in Alabama, Louisiana, Mississippi and South Carolina, as mentioned in the Solicitor General's memorandum. See, Memorandum for the United States, p. 6, fn. 3. Such a suggestion surely undertakes to obscure the fact that no case warranting equitable relief has been made out in the instant litigation. As the District Court pointed out on two separate occasions in its opinion, no evidence was presented that Virginia's prohibition of stickers or pasters had been administered in a discriminatory manner and no evidence was offered that any judge of election denied any illiterate voter the confidential assistance to which he was entitled. See, Jurisdictional Statement, Appendix, pp. 5a-7a. Indeed, even the Solicitor General admits that Virginia's procedure for cast-

ing write-in votes by illiterates, on its face, has no purpose forbidden by the Voting Rights Act and that the Attorney General does not now have evidence that such a purpose existed. See, Memorandum for the United States, pp. 7-8. Thus, the suggestion that the case be remanded to the District Court is manifestly an effort to subject to the jurisdiction of a Federal court Virginia election officials against whom no suggestion of impropriety has been made.

The only relief sought by plaintiffs in the case at bar is that they be permitted to vote by means of stickers or pasters. As the District Court held, neither the plaintiffs nor any other Virginia citizen is accorded that right, either by the Fourteenth Amendment or by the Voting Rights Act of 1965. The instant case is not now—and never was—a suit to obtain relief from alleged discriminatory registration or voting practices of Virginia election officials, and counsel for appellees submit that the Solicitor General cannot now convert it into such a suit at the ultimate level of appellate review.

For the foregoing reasons, counsel for appellees submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for appellees in the above-captioned matter, hereby certify that copies of this Response of Appellees to the Motion for the United States have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 5th day of March, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Jack Greenberg, Esq., and James M. Nabrit, III, Esq., 10 Columbus Circle, New York, New York 10019, and Oliver W. Hill, Esq., S. W. Tucker, Esq., Henry L. Marsh, III, Esq., and Harold M. Marsh, Esq., 214 East Clay Street, Richmond, Virginia 23219, counsel for appellants.

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Assistant Attorney General